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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a local ordinance which establishes ceilings on the price which property owners may charge for rental housing unconstitutional under the supremacy clause because it is in conflict with and thus preempted by the Sherman Act?

(a) Does the California Supreme Court's creation of a "public welfare" defense erroneously permit municipalities to give prevailing weight to their local concerns in defiance of specific congressional antitrust enactments which mandate a national pro-competition policy?

(b) May a municipality mandate landowners to fix rental rates in the absence of any clearly articulated and affirmatively expressed state policy and any active state supervision of the anticompetitive local program?

(c) Does the decision below fail to follow this Court's rulings which recognize that governmentally imposed vertical price maintenance is a per se violation of the Sherman Act and is thus unconstitutional under the supremacy clause?

(d) Is a local rent control ordinance protected from preemption by existing state legislation which is, at best, neutral on the subject of rent control.

2. Does a rent control law which restricts landowners to a limited return on their original investment, without regard to the appreciated value of their property, constitute a taking under the fifth and fourteenth amendments?

PARTIES TO THIS APPEAL

Appellants Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn, and Anthony Kershaw, all individual rental property owners, and Levin-Zemel, a California corporation, were plaintiffs and appellants in the courts below.

Appellees City of Berkeley, California, a municipal corporation, the Berkeley City Council and the Berkeley Rent Stabilization Board, were defendants and appellees in the courts below. There were no other parties.

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JURISDICTIONAL STATEMENT

Appellants ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN, ANTHONY KERSHAW and LEVIN-ZEMEL, a corporation, submit their jurisdictional statement and respectfully request that probable jurisdiction be noted.[1]

[1]Alternatively, appellants request that the jurisdictional statement be treated as a petition for writ of certiorari, and granted. 28 U.S.C. § 2103.

OPINIONS BELOW

The opinion of the California Supreme Court is cited as *Alexandra Fisher* v. *City of Berkeley*, 37 Cal.3d 644, P.2d , Cal.Rptr. (1984). The opinion appears as Appendix A.

The opinion of the California Court of Appeal was cited (until vacated) as *Alexandra Fisher* v. *City of Berkeley*, 148 Cal.App.3d 267, 195 Cal.Rptr. 836 (1983). The opinion appears as Appendix B.

JURISDICTIONAL BASIS

(i) Appellants filed suit for declaratory and injunctive relief in the Superior Court in and for the County of Alameda, State of California. The complaint sought a declaratory judgment that the Berkeley Rent Stabilization And Eviction For Good Cause Ordinance, Berkeley, California Ordinance 5261-N.S. (June 3, 1980) (the "Ordinance")[2] violated the Federal Constitution and an injunction against its enforcement. The superior court initially issued a temporary restraining order and then a preliminary injunction against enforcement of portions of the Ordinance. Shortly thereafter another judge of the superior court vacated the preliminary injunction and granted appellees' motion for judgment on the pleadings, declaring that the Ordinance was valid in all respects and ordering appellants to obey its mandates.[3] The California Court of Appeal, First Appellate District, Division Five, unanimously reversed the superior court and declared that the Ordinance was unconstitutional. After granting hearing, the California Supreme Court, in a 6 to 1 decision, reversed the court of appeal and sustained the validity of the Ordinance against appellants' constitutional attack.[4]

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[2] The Ordinance appears as Appendix G. Unless otherwise indicated, all references to "sections" are to sections of the Ordinance.

[3] The temporary restraining order, preliminary injunction and judgment on the pleadings appear as Appendices C, D and E, respectively.

[4] Two regular supreme court justices did not participate in the decision and were replaced by Los Angeles Superior Court judges who were assigned by the Chief Justice; the *pro tem* justices voted with the majority.

(ii) The judgment of the California Supreme Court was rendered on December 27, 1984. Appellants filed their notice of appeal in the California Supreme Court on March 18, 1985.[5]

(iii) This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2), which provides for an appeal from a final judgment of a state's highest court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." Section 1257(2) applies where a municipal ordinance has been declared constitutional by a state's highest court. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 207 n. 3 (1975); *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100 (1928); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 612 (1971).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Constitutional provisions are:

Article VI, clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth amendment, section 1: No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth amendment, section 1: No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant statutory provisions are:

15 U.S.C. § 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

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[5] A copy of the notice of appeal appears as Appendix F.

15 U.S.C. § 35: No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

Cal. Gov't Code § 65589 (Deering). Construction: (b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

(c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing elements of the local general plan.

Cal. Health & Safety Code § 1518 (Deering). Rent Controls: (a) Nothing in this chapter shall authorize the imposition of rent regulations or controls for licensed community care facilities.

(b) Licensed community care facilities shall not be subject to controls on rent imposed by any state or local agency or other local government or entity.

Cal. Health & Safety Code § 51852.5 (Deering). Exemptions for Rental Housing Developments: Notwithstanding any other provision of law:

(a) Any rental housing development which is financed from mortgages insured pursuant to this chapter shall be exempt from all of the following: . . .

(2) Any rent control except for units made available to lower income households as provided pursuant to subdivision (a) of Section 51226 and subdivision (k) of Section 51852.

Cal. Health & Safety Code § 50202 (Deering). Authority to Impose Rent Regulations or Controls: Nothing in this division shall authorize the imposition of rent regulations or

controls except by a regulatory contract between the agency or the department, as the case may be, and its housing sponsor or developer, for housing units financed, insured, coinsured or otherwise assisted by the agency or by the department, as the case may be. Except for the federal government, the right to control rent on such units shall reside exclusively in the agency or the department, as the case may be, and the housing sponsor or developer so regulated shall not otherwise be subject to controls on rent imposed by any state or local agency or other local public entity.

STATEMENT OF THE CASE

Appellants contend that the Ordinance is unconstitutional on its face pursuant to the supremacy clause and, specifically, is preempted by the Sherman Act. Appellants further contend that the Ordinance deprives them of their property without just compensation.

Appellants are owners and operators of residential rental properties within the City of Berkeley, California. On June 3, 1980, the Berkeley electorate enacted the Ordinance, which froze all rents as of May 31, 1980 at levels that already had been strictly controlled for the preceding two years.[6] Rents are allowed to rise above their frozen level only in two ways: a) the annual general adjustment, if any; and b) individual adjustments pursuant to an individual petition and administrative hearing process. Appellee Rent Stabilization Board ("the Board") presides over these processes and administers and enforces the Ordinance.

Section 11, which governs annual general adjustments, permits (but does not require) the Board to grant annual city-wide rent increases to offset certain cost increases (i.e., utility

[6] Measure I, the Renter Property Tax Relief Ordinance enacted by the Berkeley electorate on November 7, 1978 froze rents at their June 1978 levels and required landowners to pass on to their tenants 80% of their "Proposition 13" property tax savings by reducing the rents for calendar year 1979. On November 27, 1979, the Berkeley City Council passed Ordinance 5212 which froze rents at their reduced 1979 levels and permitted only a 5% increase for actual and fully documented cost increases. Section 10; Appendix G at A-122.

rates, property taxes) but prohibits general increases for any other reason. Thus the general adjustment mechanism ensures that a landowner's rental income will never be greater than it was on May 31, 1980. The Board is prohibited from granting an annual general adjustment to offset the erosionary impact of inflation on May 31, 1980 rental dollars.

Section 12, which governs the individual petition process, allows an adjustment of the 1980 rental ceiling only when, in a formal administrative hearing, the landowner demonstrates that an increase is necessary to provide "a fair return on investment." Section 12(c); Appendix G at A-129.

Thus, rents are perpetually frozen at their May, 1980 level except for: a) a very limited, discretionary annual adjustment to reimburse landowners for certain operating cost increases and b) individual adjustments but only to the extent proven necessary to provide a return on investment. Even adjustments for inflation, if permitted at all, must be achieved by each landowner separately through the individual petition process. There are more than 23,000 rental units in Berkeley.

The questions presented by this appeal were expressly decided by the California Supreme Court below in a 117 page slip opinion and are properly before this Court.[7] Appellants raised their due process claim at each stage in the proceedings below, in the superior court, in the California Court of Appeal

[7] The general rule is that on review of a state court decision, the federal question presented should be decided below in the state court in order to confer jurisdiction upon this Court. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969); *Wilson* v. *Cook*, 327 U.S. 474, 480 (1946). "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). See also, *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 n. 3 (1971); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972); *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979).

Jurisdiction also resides in this Court where the federal question is raised below but the state court failed to decide it, *Chambers* v. *Mississippi*, 410 U.S. 284, 290 n. 3 (1973), and where the state court decided the federal question, even though it was not raised by the parties below. "But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice." *Jenkins* v. *Georgia*, 418 U.S. 152, 157 (1974).

and in the California Supreme Court. The supremacy clause preemption issue was raised initially in the state supreme court with that court's express permission. In January, 1984, the court below granted applications of appellants and amicus curiae California Apartment Association to file briefs arguing the applicability of this Court's decision in *Community Communications Co. v. City of Boulder*, 445 U.S. 40 (1982) (hereinafter "Boulder") which was decided after filing of the reply brief in the Court of Appeal.[8] The preemption issue was the focal point of the first 54 pages of the slip opinion below. Appendix A at A-1 through A-35.

I.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. The Ordinance Impermissibly Conflicts With And Is Preempted By The Sherman Act.

The preemption issue raised in this appeal is of crucial significance in determining the powers of local governments nationwide, acting independently of their respective sovereign states to enact ordinances which directly interfere with federal policies favoring price competition. Departing substantially from this Court's teachings, the opinion below authorizes municipalities to contravene the Sherman Act's economic policies virtually at will, so long as the municipality seeks to serve the "public welfare."[9] If municipalities are to be given such authority—not only with respect to fixing rental rates, but,

[8] After granting the parties and amici permission to file briefs on the preemption issue, the court below wrote to counsel asking for further briefing on an extensive list of detailed questions concerning the issue. More than a dozen briefs were filed below on the subject. The state court held the issue was properly presented and ruled upon it. 37 Cal.3d at 654 n. 3; Appendix A at A-5 n. 3.

[9] The majority below acknowledged that their decision was unprecedented: "We recognize at the onset that this case forces us to wander off the map and travel cross-country without the benefit of trail or compass." 37 Cal.3d 663; Appendix A at A-15. Such acknowledged uncertainty resulted in a confused opinion below that erroneously applies antitrust and commerce clause law.

under the holding below, extending to other services and commodities deemed by those local governmental entities to be important to the public welfare—then it is for this Court (not the California Supreme Court) to so decide.[10]

B. The Ordinance Denies Landowners Any Return On The Value Of Their Property.

The Ordinance, affirmed by the decision below, establishes an erroneous constitutional standard which authorizes local governments to limit rents so that landowners will receive only a limited return on their original investment without regard to the value of their already-developed property as it has appreciated over years of ownership. The recent advent of stringent rent control laws in California, enacted by self-interested tenant electoral majorities, makes this issue ripe for resolution as it substantially affects the rights of owners of more than 23,000 rental units in Berkeley as well as many thousands of property owners in more than 50 California cities subject to local rent control (there are more than 450 cities and counties in California).

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[10] This Court should grant plenary consideration and provide its own well-reasoned opinion to afford clear guidance on this important issue. Otherwise, lower courts would be required to consider a summary disposition as binding precedent of this Court. *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975). " '[V]otes to affirm summarily, and to dismiss for want of substantial federal question . . . are votes on the merits of a case.' " *Id.* at 344, quoting from *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959).

II.

THE RULING OF THE CALIFORNIA SUPREME COURT FAILS TO RECOGNIZE THAT THE BERKELEY RENT-FIXING SCHEME IS IN DIRECT CONFLICT WITH AND PREEMPTED BY SECTION 1 OF THE SHERMAN ACT.

The court below upheld a pervasive municipal ordinance which directly fixes and stabilizes the rental prices of virtually all residential property in the City of Berkeley.[11] That ruling raises significant and critical federal issues because it departs substantially from numerous, long-standing and unequivocal precedents of this Court and creates an entirely new and erroneous rule of federal law. In particular, the California Supreme Court:

(a) created a local "public welfare" immunity for municipalitites from the antitrust laws;

(b) refused to adhere to the specific standards carefully developed by this Court for determining the circumstances under which governmentally mandated anticompetitive conduct is exempted from the coverage of federal antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943) (hereinafter "*Parker*"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*"); *Boulder*.

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[11] While the court below declined to address the issue, it is without question that the rental housing industry with its intertwined relationship with the interstate finance, construction and materials industries and the interstate movement of people and business, possesses the minimal nexus to interstate commerce to confer Sherman Act jurisdiction. *Fisher*, 37 Cal.3d at 662, Appendix A at A-14. The Sherman Act is the broadest of commerce clause enactments. *United States v. Southeastern Underwriters Associates*, 322 U.S. 533, 553 (1944); *Midcal*, 445 U.S. at 110-111. All that is required is a "not insubstantial effect" on an industry affecting commerce. *McClain v. Real Estate Board*, 444 U.S. 232, 246 (1980). It takes very little actual effect to meet the "affecting commerce" standard. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). Clearly rent control of 23,000 units has dramatic substantial effects on finance, construction and related interstate industries. See, Bay Area Council Rental Housing in California: Obstacles and Opportunities April 1983 (Appendix H); see *Fisher*, 37 Cal.3d at 716 (Lucas, J., dissenting); Appendix A at A-83-84.

(c) refused to recognize that governmentally imposed vertical price control, not otherwise exempt as sovereign state action, is preempted by the Sherman Act, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (hereinafter "*Midcal*");

(d) refused to follow this Court's consistent analysis of horizontal and vertical price-fixing as constituting per se violations of Section 1 of the Sherman Act. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); and *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (1984)]; and

(e) erroneously applied a commerce clause "balancing test" to uphold a local price fixing law which is preempted by the Sherman Act.

A. The Ruling Below Ignores This Court's Precedents Which Unequivocally Establish That Governmentally Imposed Price-Fixing, Not Exempt As "State Action," Is Preempted By Federal Antitrust Statutes.

Section 1 of the Sherman Act, by its terms, is directed at "every contract, combination . . . or conspiracy in restraint of trade or commerce . . . ." This Court has consistently ruled that any agreement or combination which has the purpose and effect of "raising, depressing, fixing, pegging or stabilizing . . ." prices is illegal *per se* under Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The Sherman Act embodies extremely important national economic policies. In *Midcal*, 445 U.S. at 110-11, it was stated:

> The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.
>
> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 31 L.Ed.2d 515, 92 S.Ct. 1126, 1135, (1972). . . .

The most critical aspect of our national antitrust policy is price competition. As this Court recognized in *Nat'l Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978):

> Price is the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 N. 59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

See also Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and *Arizona v. Maricopa County Med. Soc'y.*, 457 U.S. 332 (1982).

The California Supreme Court failed to accept this Court's long-standing teaching that price-fixing is inherently harmful to competition and that once price-fixing is established there need be no further inquiry into or evidence supporting the anticompetitive impact of the practice involved.[12] As this Court

[12] Even if an inquiry were made, it is clear that the Ordinance has significant anticompetitive impacts. Justice Lucas in his dissent, below, clearly articulated the anticompetitive effects of the Ordinance. 37 Cal.3d at 716; Appendix A at A-84:

> [R]ent control measures bring about the very evils that have prompted the United States Supreme Court's condemnation of private maximum-price arrangements. Rent control laws cripple the economic freedom of landlords and thereby restrain their ability to sell housing in accordance with their own best judgment exercised in light of market conditions. (See *Kiefer-Stewart*, supra, 340 U.S. at p. 312.) Moreover, maximum rents may be fixed too low to encourage, or even permit, landlords to furnish services or facilities deemed necessary or desirable by their tenants. (See *Albrecht*, supra, 390 U.S. at pp. 152-153) Where is the competitive incentive under a rent control scheme?
>
> As previously indicated, just as maximum pricing of goods and services generally discourages entry into the market. (See *Maricopa*, supra, 457 U.S. at p. 348), maximum rents have a negative impact on the production of new housing (Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws* (1984) 69 Cornell L.Rev. 604, 609-610; Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, supra, 32 Emory L.J. 721, 723) . . . .

ruled in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 218:

> Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

This is true not only as to horizontal price-fixing among competitors, but to vertical price restrictions as well. *United States v. Parke, Davis & Co.*, 362 U.S. 29; *Albrecht v. Herald Co.*, 390 U.S. 145; *Monsanto Co. v. Spray-Rite Service Corp.*, ____U.S.____, 104 S.Ct 1464. The Berkeley Ordinance vertically mandates that landowners stabilize the prices at which they rent their property and this, in turn, precludes horizontal price competition with respect to the 23,000 rental unit market. Section 10, Appendix G at A-122. The inevitable result is that, horizontally, price competition among landowners in Berkeley is unlawfully eliminated. *See, e.g., Midcal,* 445 U.S. at 103; *Albrecht v. Herald Co.*, 390 U.S. 145 and *United States v. Parke, Davis & Co.*, 362 U.S. 29. The inability to adjust price also prevents adjustment of "non-price' features of a product, service or commodity. In housing, for example, price-fixing virtually eliminates esthetic improvements, security services and other 'quality' features through which landowners could compete. Thus, the market and consumers are denied any diversity and innovation. A low price is, after all, not the sole objective either of consumers or of Congress, and elimination of price competition in pursuit of that single factor is beyond the constitutional capacity of the City of Berkeley. *Lafayette,* 435 U.S. at 408; *Boulder,* 455 U.S. at 50-51.

The opinion below, however, disregards decades of precedent by this Court, criticizes as "arbitrary" and "mechanical" the characterization of price fixing as illegal *per se* and concludes that the per se rule of illegality does not apply to a municipal defendant's price-fixing ordinance. 37 Cal.3d at 651;

Appendix A at A-1.[13] The California court thus summarily rejected the carefully evolved wisdom of this Court's rulings in *Midcal; Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Lafayette* and *Boulder.*

In addressing whether state laws are preempted by the Sherman Act, this Court has consistently recognized the anticompetitive impact of governmentally imposed price-fixing. It has firmly held that such mandated price fixing is in conflict with Section 1 of the Sherman Act unless immunized by the "state action" exemption of *Parker,* 317 U.S. 341. Thus, in *Schwegmann,* 341 U.S. at 389, this Court stated: "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids . . . ."

More recently in *Midcal,* this Court considered whether the Sherman Act preempted California's resale price maintenance and price posting statutes applicable to the sale of wine. It ruled that a governmentally imposed vertical price-fixing scheme is subject to the illegal *per se* analysis under the Sherman Act unless such price-fixing is accomplished pursuant to a clearly articulated and affirmatively expressed state policy and is actively supervised by the state itself. 445 U.S. at 105 citing *Lafayette,* 435 U.S. at 410. In *Midcal,* even though there was a clearly articulated and affirmatively expressed state statutory policy favoring vertical resale price maintenance, this Court nevertheless held the state program to be preempted under a *per se* illegality analysis of the Sherman Act, because the state did not actively supervise the program. 445 U.S. at 105-106. California has no clearly articulated or affirmatively expressed state policy favoring rent control nor active state supervision of this or any other municipal rent control program in California.

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[13] The California Supreme Court cited *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979) as supporting this premise. 37 Cal.3d at 66-67; Appendix A at A-20. However, *Broadcast Music* is wholly lacking in relevance to and is fundamentally different from the instant case. There, this Court observed that "blanket licensing" agreements protecting copyrighted music were proper in light of previous stipulated consent decrees. *Id.* at 11-12 and 20. Of even greater significance was the fact that Congress, in the Copyright Act of 1976 [17 U.S.C. §§ 111(d) (5), 116 (c)(4) and 118(b)], authorized the use of blanket licensing practices as a means of preventing unauthorized use of copyrighted material. *Broadcast Music,* 441 U.S. at 15, 20. There is no similar Congressional approval of local rent controls or price fixing.

The Ordinance is purely and simply a non-exempt, non-immune price fixing scheme which is in direct conflict with, and unlawful *per se* under Section 1 of the Sherman Act. In *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982), this Court observed that a "*state statute* is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." (Emphasis added.) However, the Court went on to recognize that in cases such as *Midcal* (and the case at bench), a governmentally imposed vertical price maintenance program *does* facially conflict with the Sherman Act because such price maintenance is "an activity that has long been regarded as a *per se* violation of the Sherman Act." 458 U.S. at 659-660. And, as *Lafayette* and *Boulder* make clear, the circumstances under which *local* action may be preempted are considerably broader than in the case of *state* programs such as were examined in *Midcal* and *Rice*.

The state court below disregarded *Schwegmann, Midcal* and *Rice* in refusing to apply a *per se* illegality analysis to the municipal rent-fixing ordinance and in refusing to find that control of price competition was facially inconsistent with and preempted by the Sherman Act.

The rule propounded below distorts beyond recognition both the substantive law of antitrust and the constitutional law of preemption, by expanding this Court's caveat in *Lafayette* until it swallows up the holding of the case. In footnote 48, this Court in *Lafayette* stated: "It may be that certain activities which might appear anti-competitive when engaged in by private parties take on a different complexion when adopted by the local government." *Lafayette*, 435 U.S. at 417 n. 48. Appellants construe this dictum as a caution against making assumptions about municipal activity before first examining that which appears anticompetitive to confirm whether it is anticompetitive; that is, to determine whether in fact the same or similar anticompetitive effects exist as would be caused by similar private conduct. In price-fixing cases such as the instant one, the result is the same irrespective of the actor: the interference with the setting of price by free market forces. *See*

United States v. Container Corp., 393 U.S. at 337; *National Society of Professional Engineers* v. *United States*, 435 U.S. at 679; *United States v. Socony-Vacuum Oil Company*, 310 U.S. at 226 n. 9. The court below, however construed that footnote as authority for a blanket exemption for municipal action, a proposition rejected by this Court in *Lafayette* and *Boulder*.

B. The Ruling Below Ignores The Carefully Developed Standards Established By This Court In Determining Whether Municipal Action Violates Federal Antitrust Statutes.

The Berkeley Ordinance fixes the price at which virtually all privately-owned residential rental property (more than 23,000 units) may be rented or leased.[14] The California Supreme Court recognized that the Ordinance fixed prices and also that rent control is not carried out pursuant to any clearly articulated or affirmatively expressed policy of the state, acting as sovereign; nor does the state in any way supervise local rent control programs. "California has no state rent control statute." 37 Cal.3d at 655; Appendix A at A-6. To the extent it deals with the subject at all, the statutory structure of the State of California is expressly neutral with regard to rent control[15] Nevertheless, the Court below ruled that the City of Berkeley could require all private landowners to fix the rates for the rental of residential property.

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[14] Interestingly, the Ordinance exempts residential units owned by the city from rent control. Section 5; Appendix G at A-113. The court below failed to discuss this predatory activity by the city as a market participant in the context of the "even handed" element of its own new test.

[15] As Justice Lucas' dissent noted: "It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less "clearly articulated and affirmatively expressed" any policy favoring local ordinances such as Berkeley's." 37 Cal.3d at 714; Appendix A at A-82. The four statutes which appellees asserted below as the basis of *Parker* immunity are set forth herein in "Relevant Constitutional And Statutory Provisions Involved." As a cursory reading demonstrates, each of those statutes is either a declaration of *neutrality* as to rent control or a preemptive *prohibition* thereof in a specific context. Government Code section 65589 not only declares at subdivision (b) that nothing in that article constitutes *authorization* for rent controls; it also disclaims in subdivision (c) that it similarly does not grant additional authority for "measures that may be taken ... to implement" the state housing policy embodied in that article. Health and Safety Code section 1518 prohibits rent controls on licensed community care

(Footnotes continued on following page)

Contrary to the standards established by this Court, the California Supreme Court has created a blanket exemption from antitrust requirements for municipal governmental action. Over a period of forty years, this Court has carefully articulated very specific standards for determining when and under what circumstances state and local governmental units may violate the pro-competition mandates of the Sherman Act and other federal antitrust statutes. *Parker,* 317 U.S. 341, *Midcal,* 445 U.S. 97, *Lafayette,* 435 U.S. 389, *Boulder,* 455 U.S. 40. These decisions make clear that local governmental units (such as appellee City of Berkeley), acting alone, are powerless to suspend, change or modify the federal policy commitment to free and open competition, particularly price competition.

If the achievement of some essential or important social or public interest requires suspension of competitive practices then the decision to replace competition with regulation may be made by the state as sovereign. *Parker,* 317 U.S. at 350-351. However, this Court has emphatically refused to permit cities, counties and lesser local governmental units to interfere with the pro-competition mandate of federal antitrust policy to accomplish what is perceived by local government to be a more important local interest. As stated in *Lafayette,* 435 U.S. at 408:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

(Footnotes continued from previous page)

facilities, which appellees theorized was an implied *authorization* of controls in any other context. Such silence cannot be construed as anything more than *neutrality* and certainly not a "clearly articulated and affirmatively expressed" policy favoring rent control. Health and Safety Code sections 50008 and 51852.5 likewise contain no authorization for municipal rent control. While subdivision (a)(2) of section 51852.5 appears to "contemplate" rent controls as to certain low income households, that section is part of a government-supported mortgage program wherein owners of property freely contract to supply a number of low-income units at controlled rents in consideration for low-cost financing. Section 50202 provides the key to 51852.5; it states clearly that (a) it does *not* authorize controls on units not financed under that program, and (b) there are permitted *no* controls on the latter units other than those specified in the regulatory contract freely entered into by the owner in consideration of the financing advantages conferred.

> We conclude that these additional arguments for implying an exclusion for local governments from the antitrust laws must be rejected. (Footnote omitted.)

And as was further recognized in *Lafayette,* 435 U.S. at 412-413, and reaffirmed in *Boulder,* 455 U.S. at 50-51:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. . . . In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach. (Citation and footnote omitted.)

Yet the state court below maintains exactly the opposite position:

> To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate for the motives that underlie local government regulation . . . , courts must develop tests that recognize a public welfare "defense" to alleged violation of the antitrust laws by municipalities. (Citations omitted.)

37 Cal.3d at 673; Appendix A at A-28.[16]

If a state has made the sovereign decision to suspend policies of competition in order to achieve an alternative purpose, it may choose to implement and effectuate the latter interest through the use of local governmental action. The local government, then, enjoys antitrust immunity only if its ordinance is:

> (a) enacted pursuant to a "clearly articulated and affirmatively expressed" state policy. *Lafayette,* 435 U.S. 410, 413; *Boulder,* 455 U.S. at 51-55, and

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[16] The correct rule was recognized by Justice Lucas' dissent below: "In short, *Boulder* established, cities, like private entities, 'must obey the antitrust laws' (455 U.S. at 57 quoting the *Lafayette* plurality)." 37 Cal.3d at 714; Appendix A at A-82.

(b) enforced under "active state supervision." *Lafayette,* 435 U.S. at 410; *Midcal,* 445 U.S. at 105; *Boulder,* 455 U.S. at 51 n. 14 to ensure that the local enforcement does not over-step the state's contemplated suspension of competition.

Significantly, these standards set forth by this Court have received recent reaffirmation and approval by Congress. Following this Court's decision in *Boulder,* an intense lobbying effort was undertaken in Congress to seek passage of legislation to exempt municipalities from the antitrust laws. While granting cities an exemption from monetary damage claims in antitrust actions, Congress implicitly rejected the "public welfare" theories embraced below and knowingly permitted actions for declaratory and injunctive relief based upon the supremacy clause, as well as this Court's rulings, to proceed unfettered.[17]

Contrary to the consistent rulings of this Court, and the intent of Congress so recently manifested, the opinion below establishes a blanket exemption which allows a municipality to ignore the federal antitrust laws despite the absence of a clearly articulated and affirmatively expressed state policy and without active state supervision of the anticompetitive program.

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[17] Local Government Antitrust Act of 1984, 15 U.S.C. § 35; Public Law 98-544. While space does not permit a detailed discussion here, the legislative history of the Act demonstrates clearly that Congress considered and rejected the municipal antitrust exemption imposed below. H.R. 5992, § 3, 98th Cong., 2d Sess. (1984) would have totally exempted municipal acts "reasonably undertaken to protect or provide for the public health, safety or welfare." Similarly, H.R. 5573, 98th Cong., 2d Sess. (1984) would have totally exempted "the exercise of its [a municipality's] regulatory power" but not its proprietary activities. S.B. 1578, 98th Cong. 2d Sess. (1984) would have exempted from damage liability "regulatory" activity taken "to protect the public health, safety or welfare" but not proprietary activity. H.R. 3361, 98th Cong., 2d Sess. (1984) would have exempted from damage liability conduct "within the authority vested in the unit of local government under the law of the state" and H.R. 2981, 98th Cong., 2d Sess. (1984) would have provided that municipal conduct "within the authority vested in such unit by any law" could only incur liability if a state so authorized could be liable. Ample committee history demonstrates that both House and Senate simply focused on damage remedies while leaving the vitality of this Court's *Boulder* and *Lafayette* decisions wholly intact as to the type of injunctive and declaratory relief sought in this case.

C. The California Supreme Court Developed Its Own Unprecedented Test For Determining The Validity Of Municipal Anticompetitive Action.

The state court below did not simply disregard the well-established and plainly applicable antitrust and preemption principles articulated by this Court. In perhaps its most extreme departure from precedent, the state court established a "public welfare" defense to immunize municipally imposed price maintenance schemes from the Sherman Act, even though the state, as sovereign, has been expressly neutral regarding local rent control, thereby openly flaunting this Court's rulings in *Lafayette* and *Boulder.*

The state court took it upon itself to create a new judicial rule for determining whether municipal price-fixing activity is preempted under the Sherman Act. Its test is stated thusly:

> Adapting the [United States Supreme] [C]ourt's commerce clause test to this facial section I attack on a municipal rent control ordinance, we conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. (Footnotes omitted.)

37 Cal.3d 675; Appendix A at A-31.

This "test" is borrowed, in part, from the traditional approach used by this Court to determine if a state or local enactment constitutes an undue burden on interstate commerce in cases where Congress has been silent respecting the subject matter of the regulation. *See, e.g., Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970) and *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981). It is a test used to inquire whether Congress, by its silence, intended to permit local regulation or to adopt a uniform policy of nonregulation of the subject matter

involved. Clearly, this approach has absolutely no applicability where, as here, the Sherman Act directly prohibits price maintenance programs or schemes.

But the ruling below did not just apply the wrong test, it also modified the test to make it virtually inevitable that in every case local interests will override federal antitrust policy:

> We will, however, depart from the United States Supreme Court's commerce clause test in one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions.

37 Cal.3d at 675; Appendix A at A-30.

Thus, an anticompetitive municipal ordinance will stand unless a plaintiff can carry the burden of showing that the local interest can be achieved as effectively by a means that would have a less intrusive impact on competition. In short, the California court's test permits municipalities to violate federal statutory antitrust policy if that is reasonably necessary to achieve some real or imagined local interest.

The *Midcal* case makes it clear that there is no room for balancing local interests, regardless of their importance, against the strong congressional mandate prohibiting interference with price competition. Plainly, the so-called "negative implication of the Commerce Clause" test used by the state court has no place in determining whether a local ordinance is in conflict with express federal statutory language or policy. *Hines v. Davidowitz,* 312 U.S. 51 (1941); *Nash v. Florida Industrial Comm'n.,* 389 U.S. 235 (1967); *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); Tribe, *American Constitutional Law,* §§ 6-2, 6-23 (Foundation Press, 1978).

This is not to say that some important local interests which require deviation from unfettered competition are unachievable. Indeed, this Court's prior rulings have provided the necessary "safety valve." If the state legislature, as sovereign, clearly articulates and affirmatively expresses a need to achieve a specific public purpose and chooses to accomplish that interest by limiting the forces of competition, even price

competition, that state policy may be valid. *Parker,* 317 U.S. 341.[18]

If the ruling below is allowed to stand, state and federal courts across the nation will be compelled to apply it as precedent to elevate local interests supporting municipal price fixing ordinances over the strong federal statutory prohibition against interference with price competition. The test will apply not only to ordinances which fix rental rates but also to laws which fix the price of any other service or commodity deemed important to the local public interest.[19]

Cities are not sovereigns and they are powerless to create a crazyquilt of anticompetitive havens which are free from the coverage of federal antitrust policy. If rent control is important or essential to the public interest, advocates of such legislation should direct their pleas and arguments to the state legislature, which in turn can strike the delicate balance between the need for such price maintenance *vis a vis* the importance of price competition. This is not a choice open to local governmental agencies or voters enacting laws through the initiative process, as was done here. For them it is all too easy to dismiss the long range importance and enduring value of competition in favor of urgent and immediate political or pocketbook pressures felt by a large body of tenant voters. The ruling of the California Supreme Court permits these local, parochial interests and pressures to prevail over a national legislative policy which has guided this nation's economic destiny for a century.

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[18] Legislatures in other states have clearly articulated and affirmatively expressed state policies authorizing local governments to enact rent controls. New York; *McKinney's Unconsolidated Laws of New York* (West, 1974) Book 65, §§ 8581 et seq.; Massachusetts: Massachusetts General Laws, Chapters 797, §§ 1 et seq. and 842, §§ 1-14; New Jersey: New Jersey statutes, §§ 2A, 42-74 and 42-77; Maine: Maine Revised Statutes Annotated, Title 30, Chapter 244. Appellants are aware of no municipality imposing rent control outside California without a specific state mandate to do so.

[19] The opinion below states that the "public welfare" exemption would apply not simply to "traditional" or "integral" governmental functions, but also would immunize "all local actions rationally related to the promotion of local health, safety and welfare." 37 Cal.3d at 675 n. 27; Appendix A at A-31 n. 27. Thus the City of Berkeley could fix the price of a myriad of commodities or services within the city limits, despite a negative interstate impact and a lack of state authorization or supervision.

III.

THE ORDINANCE IS CONFISCATORY.

A. Landowners Are Denied Any Return On The Value Of Their Property As Of The Date Rent Control Is Imposed.

The court below erroneously concluded that a landowner is not entitled to establish rents which provide a reasonable return on the value of his property, and that rent levels which only allow a return on historical investment satisfy constitutional requirements. The lower court's decision establishes a standard which permits confiscation of the appreciated value a landowner's property has achieved over years of ownership and operation.

The question as defined by the state court was whether "the Ordinance's investment standard is unconstitutional on its face because it unfairly deprives landowners of full long-term appreciation on the value of their regulated property." 37 Cal.3d at 685; Appendix A at A-44. The state court then answered the question: "[W]e can state with certainty that a rent control ordinance need not provide for a fair return on the value of a landowner's property in order to survive a facial challenge." 37 Cal.3d at 686; Appendix A at A-45. Thus, a long-time landowner with a small cash investment in a property which has appreciated greatly over the years is, according to the court below, not entitled to a return on the value of his property. The Constitution was interpreted to protect one's historical investment only and not a property's appreciated value achieved over years of ownership.

The state court rejected as "fallacy" the argument that the appreciated value of rental housing is entitled to constitutional protection. This conclusion was based upon an erroneous analogy between rent control laws and zoning and land use regulations which may be upheld even if they diminish the value of real property. See e.g., *Agins v. City of Tiburon,* 24 Cal.3d 266, 277, 175 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd,* 447 U.S. 255 (1980); *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and other cases cited by the court. 37 Cal.3d at 686; Appendix A at A-45. However, the attempted analogy is inapposite.

An owner of residential rental property operates an existing, fully developed business enterprise with contractual obligations to tenants and, under California law, substantial legal obligations as well.[20] The value of the landowner's property is based on its existing condition, not a future expectancy. In contrast, the value of undeveloped real property is a mere potentiality or expectancy based upon how the property might be developed in future years. Thus, zoning regulations may within certain limits alter the future development of a particular property and thereby restrict its expected future value. That is, however, a far different issue than the one decided below, where the present value of a landowner's property based on its existing use and condition is confiscated.

The proper constitutional standard to be applied is that landowners are entitled to a reasonable return on the value of their property, at the very least, as of the date it is subjected to price or rent control. This is harmonious with the standard which governs the regulation of public utility rates. The public utility standard provides for a reasonable return on the current value of the property, *Penn Central Transportation Co. v. City of New York,* 42 N.Y. 2d 324, 366 N.E.2d 1271, 1275 (1977), *aff'd,* 438 U.S. 104 (1978), or the value of the property at the time it was devoted to public use. *Southern California Gas Co. v. Public Utilities Commission,* 23 Cal.3d 470, 474, 153 Cal.Rptr. 10, 12, 591 P.2d 34 (1979). In a very real sense,

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[20] A landowner has the responsibility of maintaining the premises in a safe and secure condition. *Green* v. *Superior Court,* 10 Cal.3d 616, 111 Cal.Rptr. 704, 517 P.2d 1168 (1974). See also, *Knight* v. *Hallsthammer,* 29 Cal.3d 46, 171 Cal.Rptr. 707, 623 P.2d 268 (1981) (holding that a warranty of habitability will be implied in every rental agreement and cannot be waived, even if the condition is known to the tenant); *Stoiber* v. *Honeychuck,* 101 Cal.App.3d 903, 162 Cal.Rptr. 194 (1980) (holding that a landowner may be liable not only for property damage suffered by a tenant because of breach of warranty of habitability, but also liable for intentional infliction of emotional distress); *Smith* v. *David,* 120 Cal.App.3d 101, 176 Cal.Rptr. 112 (1981) (holding that breach of warranty of habitability may be a basis for the imposition of punitive damages); *O'Hara* v. *Western Seven Trees Corp.,* 75 Cal.App.3d 798, 142 Cal.Rptr. 487 (1977) (holding that a landowner may be liable for both compensatory and punitive damages for rape that occurred in tenant's apartment); *Uccello* v. *Laudenslayer,* 44 Cal.App.3d 504, 118 Cal.Rptr. 741 (1975) (holding that landowner may be liable for personal injuries sustained when tenant's dog bit tenant's invitee).

rental units which are subjected to rent control are committed to a public use, to create an adequate low and moderate income housing supply which the municipality desires but does not wish to pay for itself. Sections 2 and 3; Appendix G at 109-111.

The court below criticized and rejected the fair market value standard on the theory that it is circular; that is, that the value of rental property is determined by rents and thus, setting rents based upon value creates a never-ending upward spiral. 37 Cal.3d at 680 n. 33; Appendix A at 38 n. 33. However, this "problem" is illusory. Circularity is avoided altogether by allowing a fair return on the value of property at the time it was subjected to rent control. Such a value would be easy to determine and, since future rents would not affect that valuation, there would be no circularity. Moreover, a standard that recognizes future changes in value is quite workable. As stated in an analogous context in *Penn Central Transportation Co. v. City of New York*, 366 N.E.2d at 1275:

> Reasonable return, however, is an elusive concept, incapable of easy definition. For the reasonableness of the return must be based on the value of the property, and the value of the property necessarily depends on the return permitted or available. The inevitable circularity of reasoning is obvious . . . (citation omitted). In most landmark cases, however, it is acceptable to use alternative bases of valuation, assessed valuation perhaps, as a basis for determining the reasonableness of return.

Other alternative methods for determining value include replacement cost, comparable sales from outside the rent control jurisdiction, or any other generally accepted method not involving capitalization of controlled rental income. It is clear that "circularity" is not an impediment to a fair market value standard, contrary to the rationale of the court below.

Due process requires at a minimum that landowners be allowed to charge rents which provide a reasonable return on the fair market value of their property at the time it was devoted to public use, in this case, the date on which rents were first frozen. This standard would eliminate "circularity" and at the same time protect the value of a landowner's property as it has appreciated over the years prior to the enactment of rent control.

B. The Ordinance Freezes Rents And Subjects Landowners To Confiscation Caused By Inflation.

The Ordinance freezes rents as of May 31, 1980. General adjustments thereafter are permitted in the Board's discretion to offset actual, increased operating costs but are not allowed to compensate landowners for the effects of inflation. Thus, landowners are limited to the same rental dollars and profit dollars in subsequent years that they received in 1980.[21] The Ordinance requires a landowner to resort to the costly and time-consuming individual petition process in order to have any chance to recoup that portion of his 1980 profit dollars which have been eroded by inflation.[22] The court of appeal below struck down the Ordinance for this very reason:

> The purpose of rent control must be to assure fair treatment of both tenants and landlords. In our free enterprise system, the landlord should not be responsible for subsidizing rents to the extent that expenses cannot be recovered and a fair and reasonable profit cannot be received. Although [the Ordinance] would permit harm caused by inflation to be addressed by individual petitions to the Board, . . . delays in considering and acting upon individual petitions would inevitably cause delays in providing a fair return to the landlord and would therefore be confiscatory.

148 Cal.App.3d at 277; Appendix B at A-97 to A-98.

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[21] The "annual adjustment" is limited to rent increases which correspond with a limited number of actual cost increases; however, that is the maximum which may be allowed and even that is in the Board's discretion. Section 11; Appendix G at A-123.

[22] The serious effect of inflation is demonstrated by a simple example. Assuming a landowner's monthly profit on May 31, 1980 was $100, inflation had reduced its value in real terms to $56.80 by the end of 1983. This is compensable, if at all, only via the Ordinance's individual petition process. Using 1979 as a "base year," the inflation rate increased 43.2% by December, 1983 in the San Francisco-Oakland area. Using a 1977 base year, which corresponds to the initial rent fixing law, the inflation rate was 70%. CPI-All Urban Consumers, Consumer Price Index, Selected Metropolitan Areas, U.S. Department of Labor, Bureau of Labor Statistics.

The court of appeal recognized the grave confiscatory effects of a law which freezes rents and requires thousands of landowners to engage in separate administrative hearings in order to obtain rent increases to offset the inevitable effect of inflation. Relying on precedent of this Court as well as *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001, the court of appeal held that where rent ceilings of indefinite duration are imposed,

> an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for . . . situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary. "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them. . . ." *Smith* v. *Illinois Bell Tel. Co.,* 270 U.S. 587, 591, 70 L.Ed. 747, 749, 46 S.Ct. 408 (1926).

Id. at 169 quoted in *Fisher* v. *City of Berkeley,* 148 Cal.App.3d at 277; Appendix B at A-96.

Berkeley has over 23,000 rental units. The filing of a separate petition for each building owned by a landowner, requesting an increase for the effects of inflation on the landowner's 1980 rent or profit level, would create an administrative morass involving a thousand or more evidentiary hearings which would inevitably lead to delay and confiscation.[23]

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[23] The annual filing fees alone for such petition would exceed $1.5 million. Regulation 1203 of the Rent Stabilization Board.

CONCLUSION

For the foregoing reasons, it is requested that probable jurisdiction be noted.

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Respectfully submitted,

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